TAN SRI G DARSHAN SINGH A

v.

LOKE KEE DEVELOPMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
MOHD YAZID MUSTAFA JC
[CIVIL SUIT NO: S6-22-1040-2007]
10 OCTOBER 2008

LAND LAW: *Housing developers - Vacant possession - Late delivery of - Liquidated ascertained damages - Liability - Whether time of the essence – Whether first defendant exempted itself from statutory obligations - Housing Developers (Control and Licensing) Regulations 1989, reg. 11(1), (3) - Whether plaintiff waived rights to claim for liquidated ascertained damages - Whether first defendant had contractual duty to perform - Whether sale and purchase agreement did not exempt first defendant from paying liquidated ascertained damages due to financial problems - Triable issues - Whether arose - Whether plaintiff entitled to claim for liquidated ascertained damages - Housing Developers (Control and Licensing) Act 1966* C D E

LAND LAW: *Housing developers - Vacant possession - Late delivery of - Liquidated ascertained damages - Liability - Second defendant appointed to revive abandoned condominium project - Whether to replace first defendant as vendor in sale and purchase agreement between plaintiff and first defendant - Whether exempted first defendant from liability to pay liquidated ascertained damages – Whether second defendant liable towards plaintiff - Housing Developers (Control and Licensing) Regulations 1989 - Housing Developers (Control and Licensing) Act 1966* F

The plaintiff applied for a summary judgment application (encl. 9) against the first and second defendant for liquidated ascertained damages (LAD) for late delivery of vacant possession of a condominium unit. Briefly, the plaintiff and the first defendant entered into a sale and purchase agreement (the sale and purchase agreement) for the sale and purchase of a unit at Sri Emas Condominium (the condominium unit) for the purchase price of RM314,010 (the purchase price). Time was of the essence of the contract as stipulated in cl. 7 of the sale and purchase agreement. Vacant possession of the property and completion of common facilities were to be given to the plaintiff 36 months from the date of the agreement as stipulated by cl. 22(1) and cl. 24(1) of the sale and purchase agreement *ie*, on 7 September 1998. The said G H I

A date came and vacant possession was not handed to the plaintiff. Clauses 22(2) and 24(2) of the sale and purchase agreement stipulated that failure to deliver vacant possession complete with common facilities would result in the first defendant's liability to pay liquidated ascertained damages to the plaintiff. On
B 15 September 2005, the first defendant executed a 'white knight' agreement with the second defendant (the white knight agreement). The second defendant's role was to revive the abandoned condominium project and to procure the purchasers' (including the plaintiff's) agreement to waive their rights to
C liquidated ascertained damages. Clause 2(e) of the white knight agreement was inserted notwithstanding preamble (g) where it was clearly stated that the first defendant would continue to be liable for liquidated ascertained damages for its failure to deliver vacant possession within 36 months from the date of the sale and
D purchase agreement. The first defendant argued that the reason vacant possession could not be delivered within the stipulated time was attributed to the Asian financial and economic crisis in the late 1990's that inadvertently affected the financial standing of the first defendant. According to the first defendant, the said argument was
E a triable issue for the court to consider because granting summary judgment to the plaintiff would defeat the practice amongst the construction industry in appointing 'white knights' to revive abandoned housing projects. The first defendant submitted that the plaintiff had never complained about the continuation of the
F said project by the second defendant and that amounted to acquiescence. The plaintiff could not now claim for liquidated ascertained damages when his unit had been completed and delivered to him. The second defendant's argument in applying for the striking out of the plaintiff's claim against them was that the
G second defendant was not financially liable towards the plaintiff for any late delivery of vacant possession. The second defendant's role was merely to revive the condominium project which they had duly done in accordance to the 'white knight' agreement with the first defendant. The plaintiff however argued that at all material
H times he had never agreed to waive his right to claim for LAD for late delivery of vacant possession of his condominium unit. The plaintiff contended further that he had never agreed to the appointment of the second defendant to complete his unit. Therefore, the first defendant was liable to pay LAD. The plaintiff
I further submitted that the second defendant had agreed with the first defendant to be responsible towards the plaintiff by virtue of cl. 3 of the 'white knight' agreement.

Held (summary judgment against the first defendant upheld; upholding the order to have the writ and statement of claim against the second defendant struck out with costs): A

(1) From a reading of reg. 11(1) and (3) of the Housing Developers (Control and Licensing) Regulations 1989, for the first defendant to exempt itself from its statutory obligations towards the plaintiff *viz.* to be exempted from paying liquidated ascertained damages for late delivery of vacant possession of the property, the first defendant would need to obtain the controller's written consent for exemption and the application had to be made before the 36 months expired. In the present suit, the first defendant had not forwarded any such evidence to justify its stand that it was not liable for liquidated ascertained damages. (para 14) B C

(2) The plaintiff had never waived his rights to claim for liquidated ascertained damages for late delivery of vacant possession of his condominium unit. The first defendant was not merely morally responsible to complete the condominium project including the plaintiff's unit. The first defendant had a contractual duty to perform under cl. 22 and 24 of the sale and purchase agreement that stemmed from a statute *viz.* the Housing Developers (Control and Licensing) Act 1966. (para 15) D E

(3) The fact that the first defendant was financially affected by the Asian financial crisis and was thus unable to complete the condominium project on time did not detract from his statutory contractual duty. The plaintiff had paid the purchase price. Under the sale and purchase agreement and even under general contract law, the plaintiff was contractually entitled to receive consideration *ie*, the delivery of his condominium unit. The sale and purchase agreement went further to provide the plaintiff, as a purchaser, protection against the eventuality that vacant possession of the unit was delivered late in the form of liquidated ascertained damages. The sale and purchase agreement did not exempt the first defendant from paying liquidated ascertained damages because of any financial problems. (paras 16, 17 & 18) F G H I

(4) The fact that there was a third party *ie*, the second defendant being appointed to revive the abandoned condominium project also did not exempt the first defendant from liability to pay liquidated ascertained damages. The first defendant had imposed an additional condition which was onerous on the purchasers to which the plaintiff had refused to acquiesce *ie*, that liquidated ascertained damages be waived before the abandoned condominium project was to be revived by the second defendant. The plaintiff's refusal to agree to this onerous condition also did not release the first defendant from its statutory contractual duty to pay liquidated ascertained damages. There were no triable issues between the plaintiff and the first defendant. The plaintiff was entitled to claim for liquidated ascertained damages. (para 20)

(5) The second defendant was appointed to revive the abandoned condominium project and not to replace the first defendant as the 'vendor' in the sale and purchase agreement between the plaintiff and the first defendant. However, it was practically impossible for the second defendant to complete the condominium project without also completing the plaintiff's unit. To do otherwise was impractical. Furthermore, preamble g of the 'white knight' agreement clearly stipulated that it was the first defendant who was liable to pay LAD for late delivery of vacant possession and not the second defendant. Therefore, the second defendant was not liable towards the plaintiff. (para 23)

Case(s) referred to:

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Legislation referred to:

Contract Act 1950, s. 56(3)
Housing Developers (Control and Licensing) Act 1966, s. 24
Housing Developers (Control and Licensing) Regulations 1989, reg. 11(1), (3)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - G Darshan Singh (Shir Dar Singh with him); M/s Darshan, Syed Amarjit & Partners
For the 1st defendant - CC Lim; M/s Hazman Tan
For the 2nd defendant - SY Ying; M/s Azami Lim & Pang

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Yazid Mustafa JC:

Introduction

[1] I had, on 23 June 2008, dismissed both encls. 27 and 24 ie, the plaintiff's appeal against the decision of the senior assistant registrar in allowing the 2nd defendant's striking out application in encl. 21 and the 1st defendant's appeal against the decision of the senior assistant registrar's in allowing the plaintiff's summary judgment application in encl. 9.

[2] The plaintiff's summary judgment application in encl. 9 against the 1st and 2nd defendant is for liquidated ascertained damages for late delivery of vacant possession of a condominium unit amounting to RM334,691.64, interest at the rate of 10% per annum on RM334,691.64 from 10 September 2007 until full settlement and costs.

[3] The 2nd defendant is applying through encl. 21 under O. 18 r. 19 RHC 1980 to strike out the plaintiff's claim.

Summary Of Facts

[4] On 7 September 1995, the plaintiff and the 1st defendant entered into a sale and purchase agreement (the sale and purchase agreement) for the sale and purchase of a unit at Sri Emas Condominium (the condominium unit) for the purchase price of RM314,010 (the purchase price). Time was of the essence of the contract as stipulated in cl. 7 of the sale and purchase agreement. (Exhibit DSG1 encl. 9)

[5] It is also a term of the sale and purchase agreement that 'vendor' ie, the 1st defendant also includes its successors in title and permitted assigns (*Ibid* at cl. 31(h)) and that the sale and purchase agreement would be binding on the successors in title and permitted assigns of the 1st defendant, the heirs, personal representatives, successors in title and permitted assigns of the plaintiff. (*Ibid* at cl. 32)

[6] Vacant possession of the property and completion of common facilities were to be given to the plaintiff 36 months from the date of the agreement as stipulated by cl. 22(1) and cl. 24(1) of the sale and purchase agreement, *ibid* ie, on 7 September 1998. The said date came and vacant possession was not handed to the plaintiff.

[7] Clause 22(2) and cl. 24(2) of the sale and purchase agreement stipulate that failure to deliver vacant possession complete with common facilities will result in the 1st defendant's liability to pay liquidated ascertained damages to the plaintiff. Clause 22(2) of the sale and purchase agreement stipulates that liquidated ascertained damages for late delivery of vacant possession are to be calculated at the rate of 10% per annum on the purchase price on a day to day basis. *Ibid*

[8] On 15 September 2005, the 1st defendant executed a 'white knight' agreement with the 2nd defendant (the white knight agreement). (Exhibit DSG3 encl. 9). The 2nd defendant's role was to revive the abandoned condominium project (*Ibid* at cl. 2(a)) and to procure the purchasers' (including the plaintiff's) agreement to waive their rights to liquidated ascertained damages. (*Ibid* at cl. 2(e)). Clause 2(e) of the white knight agreement was inserted notwithstanding preamble (g) where it is clearly stated that the 1st defendant would continue to be liable for liquidated ascertained damages for its failure to deliver vacant possession within 36 months from the date of the sale and purchase agreement.

The 1st Defendant's Contention

[9] The 1st defendant argue that the reason vacant possession could not be delivered within the stipulated time and the fact for the appointment of the 2nd defendant is attributed to the Asian financial and economic crisis in the late 1990s that inadvertently affected the financial standing of the 1st defendant. The 1st defendant is not denying that they were late in delivering vacant possession or that the plaintiff has never, at all material times, waived his right to liquidated ascertained damages. The 1st defendant's argument is that the Asian financial crisis is a triable issue for the court to consider because granting summary judgment would defeat the practice amongst the construction industry in appointing 'white knights' to revive abandoned housing projects. The fact that the plaintiff had never complained about

the continuation of the said project by the 2nd defendant amounts to acquiescence. The plaintiff cannot now claim for liquidated ascertained damages when his unit has been completed and delivered to him.

The 2nd Defendant's Contention

[10] The 2nd defendant's argument in applying for the striking out of the plaintiff's claim against them is that the 2nd defendant is not financially liable towards the plaintiff for any late delivery of vacant possession. The 2nd defendant's role is merely to revive the condominium project which they have duly done in accordance to the 'white knight' agreement with the 1st defendant.

The Plaintiff's Argument

[11] The plaintiff's argument is that at all material times, he has never agreed to waive his right to claim for LAD for late delivery of vacant possession of his condominium unit. The plaintiff contends further that he has never agreed to the appointment of the 2nd defendant to complete his unit. Therefore, the 1st defendant is liable to pay LAD. The 2nd defendant has agreed with the 1st defendant to be responsible towards the plaintiff by virtue of cl. 3 of the 'white knight' agreement. (Exhibit DSG3 encl. 8). If it were otherwise, the said cl. 3 would not have been inserted.

The Law

[12] The 1st defendant is a housing developer and the property in question is a condominium unit. The relevant statutory provision regulating and controlling the activity of the 1st defendant is reg. 11(1) of the Housing Developers (Control and Licensing) Regulations 1989 enacted pursuant to the Minister's powers under s. 24 of the Housing Developers (Control and Licensing) Act 1966. For ease of reference, reg. 11(1) is reproduced below:

> Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[13] Clause 22(1) and cl. 22(2) of the sale and purchase agreement are reproductions of the relevant provisions under Schedule H of the Housing Developers (Control and Licensing) Act 1966. Regulation 11(3) provides for an exception to the housing developers duty that stipulates that:

> Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

Finding

[14] From a reading of reg. 11(1) and (3), it is clear that for the 1st defendant to exempt itself from its statutory obligations towards the plaintiff *viz.* to be exempted from paying liquidated ascertained damages for late delivery of vacant possession of the property, the 1st defendant would need to obtain the controller's written consent for exemption and the application has to be made before the 36 months had expired. In the present suit, the 1st defendant has not forwarded any such evidence to justify its stand that it is not liable for liquidated ascertained damages.

[15] I find that the plaintiff has never waived his rights to claim for liquidated ascertained damages for late delivery of vacant possession of his condominium unit. The 1st defendant is not merely morally responsible to complete the condominium project including the plaintiff's unit. The 1st defendant has a contractual duty to perform under cl. 22 and cl. 24 of the sale and purchase agreement that stems from a statute *viz*. The Housing Developers (Control and Licensing) Act 1966.

[16] The fact that the 1st defendant was financially affected by the Asian financial crisis thus unable to complete the condominium project on time does not detract from this statutory contractual duty. Here, I would pause to refer to the recent decision of the Court of Appeal in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors. and Other Appeals* [2008] 4 CLJ 618 at 626 para. [8] where

His Lordship Gopal Sri Ram JCA held "In our opinion there is no merit in the appellant's argument. So far as s. 56(3) of the Contracts Act 1950 is concerned, it deals with contracts generally. The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract. It follows that the requirement of notice under s. 56(3) which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in the light of the statutory scheme under the Act. This is evident in the language of cl. 22(2). On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes. Put differently, cl. 22(2) excludes the operation of s. 56(3). This is another reason for holding that s. 56(3) of the Contracts Act 1950 does not apply in cases falling under the Act."

[17] It is an undisputed fact that the plaintiff has paid the purchase price. Under the sale and purchase agreement and even under general contract law, the plaintiff is contractually entitled to receive consideration ie, the delivery of his condominium unit. The sale and purchase agreement goes further to provide the plaintiff, as a purchaser, protection against the eventuality that vacant possession of the unit is delivered late in the form of liquidated ascertained damages.

[18] The sale and purchase agreement does not exempt the 1st defendant from paying liquidated ascertained damages because of any financial problems. I would once again refer to the above decision of the Court of Appeal at p. 628 para. [13] "Applying the foregoing test, we are of the view that the defence of frustration is not available to the appellant. The 1997 financial crisis merely made it more onerous or perhaps more expensive for the appellant to perform its obligations. It did not render the contract radically different. There is a further reason why the plea of frustration should fail. Under reg. 11(3) of the Regulations it

was open for the appellant to make representations to the Controller of Housing – to quote from the Regulation – "owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary." In our judgment reg. 11(3) clearly excludes the operation of the doctrine of frustration in respect of contracts regulated by the Act."

[19] The fact that there was a 3rd party ie, the 2nd defendant being appointed to revive the abandoned condominium project also does not exempt the 1st defendant from liability to pay liquidated ascertained damages.

[20] It is pertinent to note that the 1st defendant had imposed an additional condition which is onerous on the purchasers to which the plaintiff had refused to acquiesce ie, that liquidated ascertained damages be waived before the abandoned condominium project was to be revived by the 2nd defendant. The plaintiff's refusal to agree to this onerous condition also does not release the 1st defendant from its statutory contractual duty to pay liquidated ascertained damages. The reason is the operation of cl. 22(2) of the sale and purchase agreement.

[21] Therefore, I find that there are no triable issues between the plaintiff and the 1st defendant. The plaintiff is entitled to claim for liquidated ascertained damages.

[22] The 2nd defendant was appointed to revive the abandoned condominium project and not to replace the 1st defendant as the 'vendor' in the sale and purchase agreement between the plaintiff and the 1st defendant. It is clear that cl. 3 of the 'white knight' agreement states that the 2nd defendant is under no obligation to complete any units to which the purchaser has not agreed to appoint the 2nd defendant as the 'white knight'.

[23] The plaintiff has clearly denied his agreement to appoint the 2nd defendant to complete his unit. However, it is practically impossible for the 2nd defendant to complete the condominium project without also completing the plaintiff's unit. To do otherwise is impractical. Furthermore, Preamble g of the 'white knight' agreement clearly stipulates that it is the 1st defendant which is liable to pay LAD for late delivery of vacant possession and not the 2nd defendant. Therefore, the 2nd defendant is not liable towards the plaintiff.

[24] Based on the above reasons, I had:

(i) dismissed the 1st defendant's appeal in encl. 24 and upheld the summary judgment against the 1st defendant for RM334,691.64; interest at the rate of 8% per annum on RM334,691.64 from the date of judgment until full settlement with costs; and

(ii) dismissed the plaintiff's appeal in encl. 27 and upheld the order to have the writ and statement of claim against the 2nd defendant struck out with costs.